IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. CRIMINAL JAIL APPEAL NO.1116/2003

Bhaiyyan @ Shafiullah S/o Habibullah @ Sodagar
...Accused-Appellant
Versus
The State of Rajasthan through P.P.
...Respondent

Date of Judgment ::: 6th April, 2007

PRESENT
HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN

Shri Anoop Pareek, Counsel for accused-appellant
Smt. Nirmala Sharma, P.P., for the State

//Reportable//

By the Court:-

Accused Bhaiyyan @ Shafiullah S/o Habibullah @ Sodagar has preferred this appeal against the judgment and order dated 30th June, 2003, passed by the trial court, whereby the accused-appellant has been convicted and sentenced as under:-

Under Section	*Sentence of Imprisonment*
363, IPC	To suffer six months rigorous imprisonment and a fine of Rs.500/-, (in default of payment of fine, to further undergo ten days additional rigorous imprisonment)

Under Section	***Sentence of Imprisonment***
366, IPC	To suffer one year's rigorous imprisonment and a fine of Rs.1,000/-, (in default of payment of fine, to further undergo one month's additional rigorous imprisonment)
376, IPC	To suffer seven years rigorous imprisonment and a fine of Rs.5,000/- (in default of payment of fine, to further undergo six months additional rigorous imprisonment)

All the sentences were ordered to run concurrently.

Briefly stated the facts of the appeal are that PW-4 Kishanlal Gurjar lodged a written-report (Exhibit P-3) at Police Station Subhash-Chowk, Jaipur, on 11th September, 2000, that one boy Bhaiyyan was living in a room of his house as a tenant but subsequently when he came to know that the said boy is characterless, then he got the room vacated from him about 20 days ago. It was further mentioned that on 11th September, 2000, he did not find his daughter Meena @ Renu at his house. He made a search about her. The age of Meena @ Renu is about 14-15 years. He suspected that Bhaiyyan has abducted his daughter. He also checked his Almira and found that a cash amount of Rs.30,000/- and 12 'tola' gold and other items are also missing, therefore, case be registered and legal action may be taken.

On the basis of the above report, chalked FIR No.191/2000 (Exhibit P-4) was registered under Sections 363 and 366, IPC. Kumari Meena @ Renu was recovered on 3rd June, 2002, vide Exhibit P-2. She was medically examined and her medical-report is Exhibit P-8. Her another medical-report in respect of her age is Exhibit P-10. Accused was arrested on 14th June, 2002, and he was also examined medically and his medical-report is Exhibit P-8 dated 5th June, 2002.

After completion of investigation, a charge-sheet was filed against the accused. The trial court framed the charge against the appellant for the offence under Sections 363, 366 and 376, IPC, which were denied and trial was claimed.

The trial court, after considering the oral and documentary evidence on the record, recorded a finding that prosecutrix Meena @ Renu was below 16 years of age on the date of the incident. The trial court also recorded a finding that the accused abducted Meena and committed forcible sexual intercourse with her. The trial court, therefore, convicted and sentenced the accused-appellant, as mentioned above.

The learned counsel for the appellant contended that from the prosecution evidence on the record it is clear that PW-6 Meena @ Renu was a consenting party in the present case and she was neither abducted nor any forcible sexual intercourse was committed with her by the accused. It was further contended that she was a matured girl and, as per her medical certificate Exhibit P-10, her age has been shown in between 17 to 19 years. He submitted that she was medically examined on 5th June, 2002, whereas occurrence took place on 11th September, 2000, and even if the age of the prosecutrix on the date of incident is taken into consideration in the light of her medical certificate (Exhibit P-10) then her age comes to about 16 years and in this case, being a consent case, the accused is entitled to be acquitted. He also referred the statements of PW-4 Kishanlal, PW-5 Neeta Devi and PW-6 Meena @ Renu, and the documentary evidence Exhibit P-6, transfer certificate, Exhibit P-7 and Exhibit P7-A, another transfer certificates, and contended that the learned trial court has wrongly relied upon Exhibit P-6, Exhibit P-7 and Exhibit P7-A for the purpose of determination of age of the prosecutrix. He contended that although the 3rd October, 1985 has been mentioned as date of birth of the prosecutrix in these

certificates, but these certificates have not been proved according to law, therefore, the same could not have been taken into consideration by the trial court and in case medical certificate is taken into consideration then accused becomes entitled to the benefit of higher side of the age, which comes to more than 16 years.

So far as consent of the prosecutrix is concerned, the learned counsel for the appellant contended that the facts - that the prosecutrix remained with the accused for about 21 months, she became pregnant, she delivered a male child and during this period she did not make any complaint of whatsoever nature to anyone, show that she went willingly with the accused, and, in these circumstances, he should be given the benefit of doubt and he be acquitted.

The learned counsel for the appellant lastly contended that in case this court does not agree with his submissions and accused is not acquitted then at-least the case of the accused for reduction of his sentence of imprisonment may be considered. It is contended that accused was arrested on 4.6.2002 and

since then he is in custody, therefore, he has already remained in custody for about 4 years and 10 months. Therefore, his sentence of imprisonment may be reduced to a period of sentence already undergone by him.

Per contra, the learned Public Prosecutor contended that this is a case where the age of the prosecutrix on the date of incident was below 16 years and it is fully proved from the evidence on record, and the finding of the trial court in this regard is based on oral as well as documentary evidence, both. She further contended that Exhibit P-6 is a public document wherein the date of birth of prosecutrix Renu Gurjar (PW-6) has been mentioned as 3.10.1985. Exhibit P-7 and Exhibit P7-A are also the transfer certificates of another school wherein same date of birth i.e. 3.10.1985 is mentioned. These documents are public documents and they are admissible under Section 35 of the Evidence Act. It was further contended that the date of birth of the prosecutrix was fully proved from Exhibit P-6, Exhibit P-7 and Exhibit P7-A and, in case the accused wanted to challenge these documents, the burden was on him to prove that the date of birth of the prosecutrix was not 3.10.1985, but he has not produced any documentary

evidence contrary to above referred documents, therefore, he failed to discharge his burden.

It was further contended that Exhibit P-6, Exhibit P-7 and Exhibit P7-A are fully proved and date of birth mentioned therein is corroborated with the statements of the parents of the prosecutrix i.e. PW-4 Kishanlal, PW-5 Neeta Devi, and from the statement of PW-6 Meena also. There is no ambiguity or illegality in the finding of the trial court in respect of the age of the prosecutrix i.e. below 16 years, therefore, the consent of the prosecutrix becomes irrelevant for the purpose of offence under Sections 363, 366 and 376, IPC, therefore there is no merit in the appeal and the same be rejected.

I have considered the submissions of learned counsel for both the parties and examined the impugned judgment as well as the record of the trial court.

The main controversy in the present case is about the age of the prosecutrix on the date of the incident. The relevant evidence in this regard is Exhibit P-6, the transfer-certificate dated 15.7.1995, issued by the Headmaster of A.K. Public Middle

Sanskrit School, Jaipur; Exhibit P-7, the carbon copy of the transfer certificate dated 30.7.1999 issued by the Principal, Government Girls Higher Secondary School, Gangapole, Jaipur, and Exhibit P7-A is a Photostat copy of the original transfer certificate form dated 30.7.1999, issued by the Principal, Government Girls Higher Secondary School, Gangapole, Jaipur; Exhibit P-6 was issued after passing the 5th Class by Renu. Exhibit P-7 and Exhibit P7-A were issued after passing 8th Class and declaring fail in 9th Class, respectively. In all the above three certificates, the date of birth of Meena @ Renu has been mentioned as 3.10.1985 and if the age of PW-6 Meena is calculated from this date to the date of incident then it comes to around 14 years and 11 months. Exhibit P-10 is the medical-certificate dated 5.6.2002 wherein it was opined that age of Kumari Meena @ Renu D/o Kishanlal is in between 17 to 19 years on the date of her examination on 5.6.2002. The prosecutrix was examined after one year and 9 months i.e. 21 months after the date of incident; if this period is reduced then, as per the medical-certificate, the age of the prosecutrix on the date of incident comes in between 15 years 3 months to 17 years 3 months.

PW-4 Kishanlal, the father of Meena @ Renu, lodged written- report (Exhibit P-3) on 11.9.2000, wherein the age of Meena was mentioned as 14 to 15 years. PW-4 Kishanlal in his statement before the trial court, recorded on 22.1.2003, stated the age of Meena as 17 years and 1 or 2 months on the date of his statement. The statement of PW-4 Kishanlal was recorded after two years and four months from the date of incident and if this period of two years and four months is reduced then it comes to 14 years and 10 months. PW-5 Neeta Devi, the mother of prosecutrix Meena, also stated the age of Meena as 17 years and two to four months on the date of recording of her statement before the trial court i.e. 22.1.2003 and as per this statement the age of Meena comes to about 15 years on the date of incident. PW-6 Meena @ Renu herself stated her age as 17 years on 22.1.2003 before the trial court, therefore, from the statements of PW-4, PW-5 and PW-6, the date of prosecutrix on the date of incident comes to about 15 years.

The trial court has considered the relevant evidence in detail in respect of age of the prosecutrix in Para 9 of the impugned judgment and has

recorded a finding that Meena @ Renu was below 16 years of age on the date of the incident. It is true that Headmaster, who issued certificate Exhibit P-6 and the Principal, who issued certificates Exhibit P-7 and Exhibit P7-A were not examined in the case, but these certificates were issued on 15.7.1995 and 30.7.1999, i.e. much before the date of the incident and the same appear to be old documents, therefore, it cannot be presumed that these certificates have been procured by the prosecution to prove the age of the prosecutrix below 16 years of age in the case or the same are forged one.

As per Section 35 of the Indian Evidence Act, 1872, an entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

The Hon'ble Supreme Court in Harpal Singh and Another Vs. State of Himachal Pradesh (1981 Cri.L.J. 1 SC) held that entry made by concerned official in discharge of his official duties, then the document

becomes admissible under Section 35 of the Act and it is not necessary for the prosecution to examine its author. Relevant Para of the judgment reads as under:-

> "3. .....Mr. Hardy submitted that in the absence of the examination of the officer/chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties, that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author....."

So far as medical evidence (Exhibit P-10) is concerned, it is clear that on the date of examination of Meena i.e. 5.6.2002 it was opined that she was in between 17 to 19 years of age, therefore, on the date of incident she was in between 15 to 17 years. The Hon'ble Supreme Court in Deelip Singh @ Dilip Kumar Vs. State of Bihar (2005 R.C.C. (SC) 01), has held that defence is entitled to higher side of the age as mentioned in the medical-certificate by the Medical Officer and on the basis of this principle of law the learned counsel for the accused contended that the accused is entitled to higher side of the age of

prosecutrix i.e. 17 years on the date of the incident and it should be determined that Meena was above 16 years of age on the date of the incident. The Hon'ble Supreme Court in Deelip Singh @ Dilip Kumar's case (Supra), in the facts and circumstances of that particular case, came to a conclusion that the school certificate was not proved properly and gave the benefit of higher side of the age of the prosecutrix to the accused on the basis of the medical certificate. So far as facts of present case are concerned, the same are distinguishable from above case, therefore, law laid down in above case is not applicable in the facts and circumstances of the present case.

The Hon'ble Supreme Court in Vishnu Alias Undrya Vs. State of Maharashtra {(2006) 1 SCC 283} held that expert medical evidence is not binding on the ocular evidence. Para 20 of the judgment reads as under:-

> "20. It is urged before us by Mr. Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this

> contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact."

The above referred discussion on oral as well as documentary evidence in respect of age of the prosecutrix clearly revealed that Meena @ Renu on the date of the incident was about 15 years of age. Her date of birth was mentioned as 3.10.1985 in Exhibit P-6, Exhibit P-7 and Exhibit P7-A and the said fact is fully corroborated by the ocular evidence also in the present case i.e. from the statements of PW-4 Kishanlal, PW-5 Neeta Devi (parents of prosecutrix Meena) and of PW-6 Meena also.

In these circumstances, I do not find any illegality in the finding of the trial court in respect of the age of the prosecutrix that she was below 16 years of age on the date of the incident.

In view of the above finding in respect of age of the prosecutrix i.e. below 16 years of age, the consent of the prosecutrix Meena @ Renu becomes

irrelevant. I do not find any merit in any of the contentions of the learned counsel for the appellant so far as interference in the order of conviction passed by the trial court is concerned.

So far as reduction of sentence of imprisonment of accused-appellant is concerned, I find from the record that Meena @ Renu remained with accused for about 21 months, she delivered a male child and these facts show that it was a consented sexual intercourse and cannot be said to be a forcible sexual intercourse for such a long time continuously. Meena has now already married. Therefore, all these facts are relevant and material and adequate and special reasons to reduce the sentence of the accused-appellant.

Under sub-section (1) of Section 376 IPC the minimum sentence of seven years is prescribed but it is subject to proviso that the court may, for adequate and special reasons, impose a sentence of imprisonment for a term of less than seven years.

In Prem Chand Vs. State of Haryana, AIR 1989 SC 937, in the peculiar facts and circumstances of that case, the Hon'ble Supreme Court reduced the sentence

of imprisonment of ten years awarded under Section 376 (2) IPC, to a period of sentence of imprisonment of five years. The State of Haryana filed review petition before Hon'ble the Supreme Court in the above case and the same was dismissed. The decision of the Hon'ble Supreme Court in that review petition is reported in (1990) 1 SCC 249 (State of Haryana v. Prem Chand & Others).

In Ram Kumar Vs. State of Haryana - (2006) 4 SCC 347, their Lordships of the Hon'ble Apex Court reduced the sentence of seven years under Section 376, IPC, to a period of three years imprisonment. Para No.3 of the judgment reads as under:-

> "3. The appellant, aggrieved by the order passed by the High Court has filed the above appeal by way of appeal. We have been taken through the statement and evidence recorded by the Court. Our attention was also drawn to the judgment passed by both the Sessions Court as well as the judgment passed by the High Court. The learned counsel for the appellant drew our attention to the statement of the girl Bimla (PW-5) and also drew our attention to the evidence of the doctor. We have carefully analysed the evidence tendered by the prosecution. In our opinion,

> sufficient evidence was tendered by the prosecution to prove the guilt of the accused. However, at the time of hearing it is brought to our notice that the girl has now got married and living with her husband. The said statement is also ratified by the evidence of the father of the girl. Having regard to the peculiar facts and circumstances of the case, we are of the view that the sentence imposed by the Sessions Court and as affirmed by the High Court under Sections 366 and 376 of the Penal Code is on the highside. In our opinion, ends of justice would be amply met if we reduce the sentence to three years. We do so accordingly."

In the case of State of Chhattisgarh Vs. Lekhram (2006) 5 SCC 736 the Hon'ble Apex Court reduced the minimum sentence under Section 376, IPC, of seven years to a sentence of one-and-half-year imprisonment, already undergone by accused therein. Para 16 of the judgment reads as under:-

> "16. The prosecutrix was a mature girl. She was married. She spent a few months in her in-laws' place. The respondent was working in her house. They, thus, knew each other for a long time. The prosecution evidently could not prove its case that she was enticed away from the

> custody of her guardian by the respondent on a false plea that he would marry her. She denied the said suggestion as presumably she was aware that she being married, the question of her marrying the respondent again may not arise. She lived for some time with the respondent in a rented house. Both the courts proceeded on the basis that she was a consenting party. The occurrence took place in the year 1986. The respondent preferred an appeal before the High Court in the year 1987. The same remained pending for about 10 years. The special leave petition was filed by the State 230 days after the prescribed period of limitation for preferring such appeal. The delay in filing the special leave petition, however, was condoned. He is said to have remained in custody for about one-and-a-half years. In the peculiar facts and circumstances of this case and having regard to the facts that both the courts have arrived at the conclusion that she was a consenting party, in our opinion, it may not be proper to send the appellant back to prison."

In view of the above discussion, I find this case to be a fit one to reduce the sentence of the accused-appellant to a period of four years and 10 months, already undergone by him.

Consequently, the appeal is partly allowed. The conviction and sentence of the accused under Sections 363 and 366, IPC, is maintained but while maintaining his conviction under Section 376, IPC, his sentence of imprisonment under this Section is reduced to a period of imprisonment already undergone by him. The appellant is in jail, therefore, he be released forthwith if his custody is not required in any other case.

(Narendra Kumar Jain) J.

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